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September 17, 1999

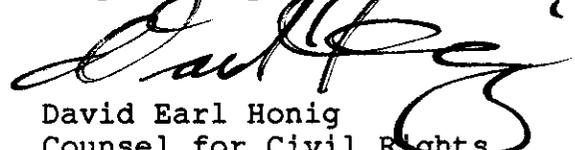
Hon. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Dear Ms. Salas:

RE: MM Docket No. 99-25 (Low Power Radio)

On behalf of the Minority Media and
Telecommunications Council et al. ("Civil Rights
Organizations"), transmitted herewith are the
original and four copies of our Reply Comments.

Respectfully submitted,


David Earl Honig
Counsel for Civil Rights
Organizations

Enclosures

cc (w/enclosures):

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of) MM Docket No. 99-25
Creation of a Low Power Radio Service) RM-9209
) RM-9242

TO THE COMMISSION

REPLY COMMENTS OF CIVIL RIGHTS ORGANIZATIONS

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Cultural Environment Movement
Fairness and Accuracy in Reporting
League of United Latin American Citizens
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Minority Business Enterprise Legal Defense
and Education Fund, Inc.
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National Asian American Telecommunications
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National Indian Telecommunication Institute
National Latino Telecommunications Taskforce
Native American Journalists Association
Project on Media Ownership
Puerto Rican Legal Defense & Education Fund
Rainbow/PUSH Coalition
San Diego Community Broadcasting School
Telecommunications Advocacy Project */
Telecommunications Research and Action Center
Women's Institute for Freedom of the Press

September 17, 1999

*/ These organizations signed onto the Civil Rights Organizations' Comments since their filing.

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SUMMARY

Virtually all of the nation's leading minority and civil rights organizations have enthusiastically endorsed LPFM. Done properly, LPFM could be an enormous win-win proposition for the industry, for minority ownership, for new voices and for the listening public.

Operated noncommercially, LPFM stations will be large enough to stand on their own, but too small to harm incumbents.

Nonetheless, some broadcasters seek protection from LPFM because it will compete with them. These arguments are often clothed in the language of interference. However, those making these arguments seldom object when comparable interference-generating proposals are designed to benefit incumbents.

Demands for protectionism hark back to the 1950s, which gave us the Carroll Doctrine and its theory of "ruinous competition." Before it was repealed in 1988, incumbents frequently misused the doctrine as "an anticompetitive tool to delay the entry of new stations."^{*}/ Having disinterred the doctrine, some of today's incumbents are misusing it for the same improper purpose today.

The bottom line is that incumbency must continue to convey no immunity from competition.

^{*}/ Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations (Report and Order), 3 FCC Rcd 638, 640 (1988).

Done properly, LPFM will promote minority ownership in a constitutionally permissible manner. By giving the first LPFM licenses to HBCUs and schools with a similar mission, the Commission can help remedy the long history of official discrimination against these schools.

We expect that many community-service broadcasters will help these schools. To facilitate sales training, these broadcasters should have should be allowed to place some inventory on the schools' LPFM stations. In this way, the Commission can promote diversity, meet a major EEO need, and help incumbents at the same time.

Never has there been so much pent-up demand for a chance to be heard over the air. As the nation grows and diversifies, so must its heritage broadcast service. LPFM beautifully meets this goal. We are confident that hundreds of dedicated volunteers -- experienced and willing to learn -- will build a broadcast service that will be well regarded, diverse, inclusive and democratic.

* * * * *

The 26 organizations listed above (collectively "Civil Rights Organizations") respectfully submit these Reply Comments in response to the NPRM, 14 FCC Rcd 2471 (1999) ("NPRM").^{1/}

I. LPFM's Potential Competitiveness Provides No Basis For Preventing Its Creation

As a means of providing the voiceless with an opportunity to be heard on the air, LPFM is arriving at the best possible time. The broadcasting industry has never been stronger. It can easily absorb new entrants. Moreover, the industry is endowed with hundreds of civic-minded individuals who will help their local churches, unions, schools, civil rights organizations and civic groups build a strong and respected LPFM service.

Nonetheless, some broadcasters simultaneously contend that LPFM is both too potent to compete against, and too impotent to compete effectively. These contentions cannot both be correct. As shown below, both contentions are without merit unless the Commission brings back the long-discredited Carroll Doctrine.

Many commenters have been careful to conceal their desire for protectionism by using the language of technical interference. However phrased, it is still the language of protectionism.^{2/}

1/ The views expressed in these Reply Comments are the institutional views of the organizational commenters, and do not necessarily reflect the individual views of any commenter's officers, directors or members.

2/ As we have noted, incumbent broadcasters hardly object to FM translators and boosters, although they have the same impact on spectrum occupancy and interference that LPFM stations would have. That proves that when some broadcasters' speak of LPFM "interference," they really mean competition. See Comments of Civil Rights Organizations at 5.

LPFM would be objectionable if it caused the quality of FM signals to deteriorate so that FM sounds like AM. But no one seriously contends that this could happen. Instead, the technical studies submitted both by proponents and opponents can be summed up as follows: LPFM might reduce some incumbents' service areas slightly, and some cheaper or older radio sets with low selectivity may be affected if they are used to receive distant signals^{3/} -- but LPFM would not impair the quality of incumbent FM stations within their normal, protected contours.^{4/} LPFM opponents have failed to provide any information showing that "the populations allegedly losing such [incumbent] services exceed the populations gained from new stations."^{5/}

A comment typical of those filed by state and local broadcast association was that "[t]his LPFM interference effect would unnecessarily impact broadcasters' investments in their facilities, would make over-the-air FM radio a less viable medium for advertising and other message dissemination and would provide

3/ The National Association of Broadcasters (NAB) believes that LPFM might diminish the effectiveness of low-end clock radios in receiving distant signals. See NAB Comments at 39. This concern has no public interest significance. Because these sets are typically used to wake people up in the morning, they are normally tuned only to very reliably received, close-in signals. Those signals' reception wouldn't be affected by LPFM.

4/ Indeed, it is more likely that LPFM would affect receiver quality than vice versa. Listener demand for LPFM should persuade manufacturers to develop new low cost, low-end receivers with better signal selectivity. Better receivers would mostly benefit incumbent licensees, who lay claim to a far greater number of signals -- and stronger signals -- than would LPFM.

5/ This balancing test was articulated in Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments (BC Docket No. 80-90) (Report and Order), 94 FCC2d 152, 164 ¶31 (1983).

listeners with signals offering less than acceptable technical quality."^{6/}

A decrease in an incumbent's coverage area which does not result in any additional service would be objectionable. However that's not the case with LPFM. LPFM would permit possibly thousands of new broadcasters to take to the air. The only parties finding this offensive are some broadcasters who apparently long for more government intervention in the free marketplace.

Leading those who claim that LPFM would be too successful is the National Association of Broadcasters (NAB). The NAB crowded its high-amplitude filing with subjective claims of economic ruin. It contends that these tiny new stations would compete so mightily that some incumbents' service "[could not] adequately be replaced."^{7/}

Similar arguments were advanced by some noncommercial broadcasters.^{8/} National Public Radio (NPR) asked the Commission to "assure that the pursuit of diversity through the establishment of low power broadcast service does not undermine the service provided

^{6/} Southern California Broadcasters Association Comments at 21.

^{7/} NAB Comments, Vol. I, at 55. Typical of the comments cited by NAB was that of a Maryland General Manager who declared that "[i]f we lose advertising to these new cheapie radio stations, our survival is threatened because we won't be able to meet operating expenses." Letter of Ada E. Gollub, General Manager, WMJS radio, to Sen. Barbara Mikulski, March 24, 1996, cited at NAB Comments, Vol. I, at 55. See also Letter of Dudley Waller, Waller Broadcasting, Inc. to FCC, June 15, 1999, cited at NAB Comments, Vol. I, at 55, stating that "[i]f LPFM is created the interference caused in a substantial position of [our] Metro will result in the loss of many of our present listeners. The lower ratings will cause revenue losses we simply cannot afford."

^{8/} Such comments are surprising. Public broadcasting's heritage lies in diverse programming that commercial advertisers are unlikely to subsidize. Public broadcasting is about public service, not empire building. Public broadcasters ought to be delighted to see more noncommercial voices coming into being.

by public radio stations...and waste the substantial investment that has made it possible."^{9/} The Corporation for Public Broadcasting (CPB) predicted that "because they are unlikely to be technically benign or economically self-sufficient, LPFM stations would degrade public radio services...without providing sustainable new service in its place."^{10/}

To understand why these arguments lack merit, it might be useful to recall the FCC's experience with protectionism. In Carroll Broadcasting Co. v. FCC, 258 F.2d 440, 443 (D.C. Cir. 1958), the court required the Commission to consider an incumbent licensee's argument that "in a given area...available revenue will not support good service in more than one station....To license two stations where there is revenue for only one may result in no good service at all." This became known as the Carroll Doctrine.^{11/}

In no case did the Commission actually apply the Carroll doctrine. Instead, it held repeatedly that it had no business artificially restricting the availability of public resources to

^{9/} NPR Comments at 8-9.

^{10/} CPB Comments at 2.

^{11/} Even in the eyes of its creator, the D.C. Circuit, the Carroll Doctrine was never intended to provide incumbents with easy immunity from competition. The Court explained that "[p]rivate economic injury is by no means always, or even usually, reflected in public detriment. Competitors may severely injure each other to the great benefit of the public....The public interest is not disturbed if A is destroyed by B, so long as B renders the required service. The public interest is affected when service is affected....If the protestant fails to bear the burden of proving his point (and it is certainly a heavy burden), there may be an end to the matter." Id. at 443-44.

protect incumbents.^{12/}

The FCC repealed the Carroll Doctrine in Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations (Report and Order), 3 FCC Rcd 638 (1988). The Commission found that the Carroll Doctrine had outlived its usefulness "in light of the tremendous growth of broadcast and substitute media outlets." Id. at 639. It noted that between 1972 and 1982 there had been more than 80 cases involving claims of Carroll injuries, none of which provided "sufficient evidence to warrant a finding of harm that would result in a net loss of service to the public." Id. at 639-40 (fn. omitted). However, routine requests for Carroll issues enabled incumbents

to delay competition in an attempt to further enhance their own position in the market. Thus, the Carroll doctrine may have had the undesired effect of providing existing licensees with an anticompetitive tool to delay the entry of new stations. It is not surprising, then, that existing broadcasters continue to make claims of economic injury against new competitors based on weak showings even though it is well known that the standards for demonstrating such injury are stringent.

^{12/} See, e.g., Commercial FM Broadcast Assignments (BC Docket 80-90) (R&O) 94 FCC2d 152, 158 (1983) (a "basic objective" of the Commission has been to provide "outlets for local expression addressing each community's needs and interests"). See also Television Channel Allotments (VHF Drop-ins) (NPRM), FCC 80-545, 45 FR 72902 (November 3, 1980) at ¶¶9, 12 ("any potential loss experienced [by incumbents] will be more than offset by the benefits of such a policy -- additional television service for the public...it is in the public interest to have a regulatory framework that permits the maximum number of signals that can be economically viable" (fn. omitted). See also Low Power Television (R&O), 51 RR2d 476, 525 (1982) (Separate Statement of Chairman Fowler and Commissioner Dawson) ("[l]ow power television may not have the transmission capabilities of full broadcast television, but its capacity to provide televised programming that is directly responsive to the interests of smaller audience segments makes it truly unique in its ability to expand consumer choices in video programming. From this perspective, the power of these stations may be low, but their potential is enormous.")

Id. at 640 (emphasis added, fn. omitted).

The Commission further concluded that the underlying premise of the Carroll Doctrine, the theory of "ruinous competition," was not valid in broadcasting:

[t]his economic theory of 'ruinous competition' had some credence at the time the Carroll case was decided, but has since been largely discredited and is no longer widely accepted by economists. Furthermore, on the basis of our own experience, the structure of the broadcasting industry bears little resemblance to the type of industry structure where it was believed ruinous competition could occur....a new broadcasting station may actually exploit an untapped segment of the existing market, with the result that the aggregated level of broadcast revenues in the market will rise....Thus, the competitive effect of a new station on the existing broadcast service in a market is not simply a function of what happens when a static revenue base is shared with an additional station. It involves instead a complex set of relationships the interaction of which... favors an overall increase in service redounding to the public.

Id. at 640.

Finally, the Commission recognized that the Carroll doctrine conflicted "with our general policy of relying wherever possible on market forces rather than on government regulation to direct the programming activities of mass media industries." Id. It pointed out that

[i]n an environment where individual broadcast licensees are not protected from competition resulting from entrants providing new non-broadcast communications services, to impose competitive restraints on the entry of new broadcast stations places prospective broadcast entrants at a competitive disadvantage with respect to entrants in other mass media services. A policy that encourages entry and competition with broadcasting through new media forms on the one hand but protects existing broadcasters from competition from new broadcast stations on the other would appear inconsistent.

Id. at 640 (fns. omitted).

Commercial broadcasters' zeal to seek federal protection against LPFM contains profound irony. It contrasts sharply with their desire to be free of federal intervention that seeks to limit market concentration, require some measure of community-responsive programming, or monitor fair employment practices. Those who most stridently oppose the "heavy hand of government" when it protects consumers now want that same heavy hand to wave away competition. In short, having disinterred the Carroll doctrine, some of today's incumbents are misusing it for the same improper purpose which led to its repeal.

Deregulation has been very good to incumbent broadcasters. Radio advertising revenues are at a record high, and the stock market has listened. Small, noncommercial stations pose no credible competitive threat to incumbent broadcasters. They certainly could not rise to Carroll's level of "ruinous competition."

In any event, our LPFM proposal would help incumbents compete even more effectively. We proposed that a commercial station be permitted to place inventory on the LPFM stations of HBCUs and other schools with similar missions, to help train students in broadcast sales.^{13/} A commercial station would then profit from LPFM in two ways: it would have access to promising entry-level talent without having to carry all of the training costs by itself, and it would have a second outlet for some of its inventory. Broadcasters should embrace this proposal as a fair solution to their fears of competitive harm.

^{13/} See Civil Rights Organizations' Comments at 76-79.

**II. LPFM's Potential Noncompetitiveness Provides
No Basis For Preventing Its Creation**

In the same breath used to claim that LPFM would be too potent, some incumbent broadcasters claim it would also be too impotent. A typical argument is that LPFM is unworthy of being born because it won't be available in very large urban markets.^{14/} This argument is patently without merit. Impediments to the national availability of any service provide no logical reason to restrict the service where it can be offered.

Other commenters contend that LPFM stations would be operated by newcomers who cannot be trusted to provide good service.^{15/} However, all broadcasters were originally "novices." Indeed, if immediate success were a prerequisite to the creation of a new broadcast service, radio would never have been born, nor television, nor satellites, nor cable. In their infancy, these services were each run by novices, and they did pretty well.^{16/} Indeed, LPFM

^{14/} See NAB Comments at 55, 80.

^{15/} See, e.g., Joint Comments of the Named State Broadcasters Associations at 6-7 ("[t]he creation of low power FM will add a class of novice broadcasters to the airwaves with poor equipment, limited experience, and drastically less financial backing than a professional broadcaster. This will create a liability which the Commission will have to monitor in order to ensure that low power broadcasters and their equipment are operating within established parameters and not threatening the public safety.")

A related argument is that those who formerly broadcast without a license (who some incumbents label "pirates") might not bother going through the licensing process and "will simply set up shop anyway." Id. at 7. Put another way, the government should not feed the poor because some of them will still steal bread.

^{16/} The Commission has long recognized the dangers in giving too much credit to "broadcast experience" in determining who can secure a broadcast license. Broadcasting can be learned on the job, and overemphasis on experience inhibits new entrants. See Policy Statement on Comparative Broadcast Hearings, 1 FCC Rcd 393, 396 (1965).

would be built by a far more experienced array of talent than those who built earlier broadcast services. LPFM would be built largely by the hundreds of commercial and noncommercial community-minded broadcast employees, by broadcast educators, by experienced broadcasters forced out of their life careers by consolidation, and by retired broadcasters giving back a lifetime of learning. These individuals belong to the churches, unions, civil rights organizations, schools and neighborhood groups that would comprise the vast majority of LPFM stations. The huge community of civic-involved experienced broadcasters will ensure that LPFM is well built, well maintained and well regarded.

**III. The Good Stewardship Of Incumbent Stations
Is No Reason To Protect Them From Competition**

The record is filled with self-laudatory statements by incumbent broadcasters. One study points out that consolidation is not yet complete, leaving many independent stations still standing.^{17/} Another study suggests that consolidation has fostered format diversity,^{18/} although none attempted to make a serious case

^{17/} See Mark R. Fratrick, "Independent Radio Voices in Radio Markets" (August, 1999) (submitted with the NAB's Comments). Dr. Fratrick states that "[M]uch has been written concerning the consolidation in the ownership of radio stations. One concern expressed has been the diminution of independent voices available to the American public. Yet, there is still a considerable amount of radio stations that are not part of a local cluster of stations." Id. at Executive Summary, p. 1. This argument can be analogized to anti-conservationists' advocacy of unchecked development on the theory that some of America still hasn't been paved over.

^{18/} Mark R. Fratrick, "Format Availability After Consolidation," (August, 1999) (submitted with the NAB's Comments) (maintaining that "one immediate result [of consolidation] has been an increase in the number of formats available to the American public. Given that consolidation is continuing, and some recent acquisitions have not been finalized, we can only expect this trend to continue." Id. at Executive Summary, p. 1.

that consolidation has fostered viewpoint diversity or ownership diversity.^{19/}

Leaving aside the puffery and definitional bias in these comments and studies, let us assume that every statement in the record lauding incumbents' service is true. Indeed, let us assume that all incumbents are excellent broadcasters, providing diverse viewpoints, offering substantial nonentertainment programming at all hours, airing a wide variety of opposing views on issues on a sustaining basis, and offering equal employment opportunity, training and assistance to minority and female broadcasters. There would still be no reason to prevent competition.

In any other industry, the argument that competition should be restricted because some incumbents provide some subjective level of "good service" would be laughed out of court. No operator of quality cruise ships would seek a ban on sailboats. No operator of daily newspapers wants to stifle church bulletins. And after 1984, even the telephone industry renounced domestic protectionism.

^{19/} The need for one kind of music over another is an insignificant governmental interest. Other diversity interests are far more critical. As one commentator (and MMTC law clerk) expressed it recently, "[d]iversity results from decentralized ownership and diverse local programming addressed to the specific needs of a small community. The incumbent broadcasters have not recognized the benefits of low power stations that will cater to the narrow and specific interests of small communities and neighborhoods." Fatima Fofana, "Creating a Diversity of Voices: Local Expression Through a Low Power FM Service," 7 CommLaw Conspectus 409, 418 (1999).

An incumbent with good service is never insecure about the possible success of new entrants. A community-service oriented broadcaster does not fear competition: she welcomes it, deriving value as newcomers draw new customers and new talent into the industry.

IV. There Are No Meaningful Alternatives To LPFM

The NAB contends that "[t]here is nothing preventing individuals from applying for an unassigned allocation when a window is available or from petitioning the Commission to allocate a channel to their community, if one is available."^{20/} Actually, if these unassigned allocations were so attractive, NAB members themselves would be applying for the allocations en masse. The reason so few applications for new full power allocations are filed is that these opportunities are rare, expensive, time-consuming, and entirely unavailable in all but the smallest markets. The costs of applying for and winning a license exceed \$500,000.

Furthermore, full power commercial service would not meet the needs addressed by LPFM proponents. Most LPFM applicants do not desire to make a profit, and do not desire to serve wide areas. They wish to serve provide neighborhoods with local programming on a nonprofit basis. Neither incumbent broadcasters nor new full power stations can meet this need.

Another common argument made by incumbent broadcasters is that low power advocates can simply build Internet radio stations and reach the entire nation inexpensively.^{21/} If the Internet were

^{20/} NAB Comments at 81.

^{21/} See, e.g., Southern California Broadcasters Association Comments at 21 ("now, every person in America can be a broadcaster -- and reach a worldwide audience.")

really such an attractive radio medium, we would expect incumbents to be following their own advice -- turning in their licenses and reaching the whole country cheaply via the Internet. This is not happening because full power broadcasters realize that over-the-air radio is the only medium capable of providing local communities with a 24-hour, locally focused, universally accessible service that's free to all listeners. People enjoy radio in cars, in the park and at work -- everywhere computers aren't available. Just as television didn't replace the movie-going experience, the Internet will not replace the radio listening experience. The newspaper and book industries, and public libraries, all thrive notwithstanding the Internet because they offer consumer attributes that the Internet cannot provide. So does radio. Internet radio penetration probably never will achieve the nearly 100% accessibility of over-the-air radio.

V. LPFM Will Promote Minority Ownership

As we demonstrated in our Comments, minority ownership is deeply threatened by consolidation, and is unprotected by any countervailing remedial policies. While LPFM is hardly a panacea for the dearth of minority ownership, it presents an opportunity to provide minority and disadvantaged business with the training to and know-how to advance to full power media ownership. LPFM does this without offending the current affirmative action standards set by the Supreme Court. LPFM is also a means by which the FCC can finally redress some of the harm it did to minorities and HBCUs when its licensing policies intentionally ratified, validated, facilitated and promoted race discrimination.^{22/}

^{22/} See Civil Rights Organizations' Comments at 34-64.

Some minority owners opposed LPFM, although in moderate tones and without any of the anti-consumer protectionism voiced by many nonminority commenters.^{23/} These minority broadcasters' concerns are entitled to respect, and we have taken them into account in developing an LPFM proposal that would advance the cause of minority ownership. We have proposed that LPFM would operate only noncommercially, with the least practicable level of interference.^{24/} To remedy past discrimination, minority schools would have the first opportunities to obtain LPFM licenses.^{25/} Finally, we proposed that broadcasters assisting these schools in training salespeople would be permitted to place some inventory on the stations.^{26/} In our experience, about half of the tangible assistance to minority schools' broadcast programs is already provided by minority-owned companies. These companies would thus be well positioned to take full advantage of the training incentives in our proposal.

Conclusion

Configured as we have proposed it, LPFM would offer a significant net advantage to incumbent minority broadcasters. In addition, it would bring into being dozens, possibly hundreds, of new minority-owned noncommercial broadcasters whose voices deserve to be heard.

^{23/} See, e.g., Comments of Radio One.

^{24/} We proposed that the Commission license only 50 and 100 watt stations, rather than higher-power, higher-interference 1000 watt stations or hard-to-regulate 10 watt microradio stations. Civil Rights Organizations' Comments at 19-20.

^{25/} Id. at 64-76.

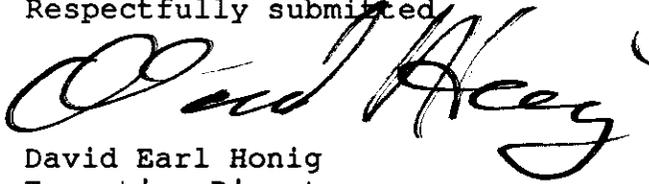
^{26/} Id. at 76-79.

Done right, LPFM could be a huge victory for broadcasting. LPFM is a win-win proposition for the industry, for minority ownership, for new voices and for the listening public. That is why virtually all of the nation's leading minority and civil rights organizations have enthusiastically endorsed LPFM.

Never has there been so much pent-up demand for a chance to be heard over the air. As the nation grows and diversifies, so must its heritage broadcast service. LPFM beautifully meets this goal. We are confident that hundreds of dedicated volunteers -- experienced and willing to learn -- will build a broadcast service that will be well regarded, diverse, inclusive and democratic.

* * * * *

Respectfully submitted



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